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In The

Supreme Court of the United States

October Term, 1993

PRISCILLA M. GARCIA, MARICELA BUITRAGO, and LOCAL 115, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,

Petitioners,

vs.

SPUN STEAK COMPANY, A California Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the Ninth Circuit correct in refusing to enforce the EEOC Guideline, based on "compelling indications that it is wrong," since that Guideline automatically presumed that workplace "English only" rules discriminate on the basis of national origin, without any required factual showing by the plaintiff?

2. Is the Ninth Circuit's decision that Spun Steak's "English only" rule did not violate Title VII consistent with the two other courts of appeals' decisions which have decided the legality of workplace "English only" rules[1], so that there is no conflict among the circuits and thus no grounds for certiorari under Supreme Court Rule 1(a)?

3. Does this Court's recent decision clarifying the requisite showing for plaintiffs in sexual harassment hostile environment cases (*Harris v. Forklift Systems*, __ U.S. __, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)) have any applicability to challenges to workplace "English only" rules?

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1. *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert denied*, 449 U.S. 1113 (1981), and *Jurado v. Eleven-Fifty Corp.*, 813 F. 2d 1406 (9th Cir. 1987).

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SPUN STEAK COMPANY, A California Corporation,

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Spun Steak Company, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit's judgment in this case.

STATEMENT OF THE CASE

Respondent incorporates by reference the statement of the case as set forth in the Ninth Circuit's opinion. (App. 2a-4a).

REASONS FOR DENYING THE WRIT

(1) The Ninth Circuit's decision is consistent with the only other courts of appeals' decisions on point, and, *a fortiori,* there is no conflict among the circuits, so certiorari is not warranted under Supreme Court Rule 1(a).

(2) The Ninth Circuit correctly refused to enforce the EEOC Guideline, because, *inter alia,* that Guideline shifted the burden of proof to the defendant in a manner which is diametrically opposed to the rule laid down in *McDonnell Douglas v. Green,* 411 U.S. 792 (1973) and its progeny.

(3) This Court's recent decision in *Harris, supra,* does not, in any way, undermine the validity of the Ninth Circuit's analysis or holding.

(4) The Ninth Circuit's conclusion that Spun Steak's "English-only Policy" (hereinafter "Policy") did not violate Title VII is correct.

ARGUMENT

I.

THE OPINION BELOW IS CONSISTENT WITH THE OPINIONS OF THE OTHER COURTS OF APPEALS WHICH HAVE DECIDED THE ISSUE.

United States Supreme Court Rule 1(a) provides that:

> [C]ertiorari will be granted only when there are special and important reasons therefor, such as:
>
> (a)(1) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter.

The Ninth Circuit's decision below is consistent with the other leading case on point, *Garcia v. Gloor,* 618 F.2d 264 (5th Cir. 1980), *cert. denied,* 449 U.S. 1113 (1981), previously adopted as the law of the Ninth Circuit in *Jurado v. Eleven-Fifty Corp.,* 813 F.2d 1406 (9th Cir. 1987). In *Garcia,* the Fifth Circuit explicitly rejected the contention, which EEOC subsequently formalized into the "Guideline" at issue herein, that "English only" rules violate Title VII when applied to bilinqual employees. *Garcia, supra,* 618 F.2d at 272. "The argument [made by EEOC and the plaintiff] thus reduces itself to a contention that the statute [Title VII] commands employers to permit employees to speak the tongue they prefer. We do not think the statute permits that interpretation, whether the preference be slight or strong or even one closely related to self-identity." *Id.* at 271.

Petitioners make much of their right to express their "cultural heritage"; while Petitioners are free to do so during non-working hours, being allowed **any** conversation during working hours is a

privilege. As stated by Judge O'Scannlain in the opinion of the Ninth Circuit below, "The employees have attempted to define the privilege as the ability to speak the language of their choice. A privilege, however, is by definition given at the employer's discretion; an employer has the right to define its contours." (App. 11a). "Title VII, however, does not protect the ability of workers to express their cultural heritage **at the workplace**." *Id.* (emphasis supplied.)

All of Petitioners' "evidence" about the harms resultant from being denied the right to express their cultural heritage is inapposite here; Petitioners can express their cultural heritage, just not during working hours. By extending the logic of their argument, Petitioners and EEOC would prohibit an employer from banning employees from wearing Nazi or Communist paraphenalia on the job because to do so would restrict some employees' "right" to express their cultural heritage, and such rule would have a disparate impact on persons whose nation of origin is outside the United States. Petitioners and EEOC trivialize Title VII by attempting to expand its contours to proscribe any inconvenience to employees; as the Ninth Circuit correctly stated "Title VII is concerned only with disparities in the treatment of workers, it does not confer substantive privileges." *Id. citing Garcia, supra.* The Ninth Circuit goes on to state "We have been impressed by Judge Rubin's pre-Guidelines analysis for the Fifth Circuit in *Garcia*, which we follow today." (App. 16a). The decision below maintains uniformity of the circuits and is in accord with the only two courts of appeals' decisions on point.

Despite the fact that the criteria of Rule 1(a) is *not* met in this case, Petitioners nonetheless seek certiorari. Petitioners' brief does not even cite *Garcia,* indisputably the leading case on the issue of the legality of workplace "English only" rules and the case

"followed" by the Ninth Circuit below.[2] (App. 16a); *See* Petitioners' Table of Authorities, page vi. Petitioners do continue to cite vacated cases, despite this Court's uniform holdings that vacated cases have no precedential value.[3] Petitioners were specifically reminded of this basic principle by the Ninth Circuit. *See* footnote number 1 of Ninth Circuit Opinion (App. 10a).

Petitioners do not let small obstacles, such as adverse Rules of Court or controlling law, deter them from re-arguing their social policy theories to this Court even after two circuits have already rejected those theories. Because the Ninth Circuit's decision below is consistent with the law of the Fifth Circuit (*Garcia*), as well as the prior law of the Ninth Circuit (*Jurado*), there is no conflict with any other courts of appeals' decision. Therefore, this case does not warrant certiorari under Supreme Court Rule 1(a).

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2. Petitioners' failure to notify the Court of this adverse authority which is directly on point shows that they cannot distinguish *Garcia*. Petitioners also fail to mention that *Garcia* was adopted as the law of the Ninth Circuit in *Jurado, supra*.

3. Apparently the only judge on the entire Ninth Circuit who agrees with petitioners that the vacated *Gutierrez* decision represents the proper interpretation of Title VII is the author of the *Gutierrez* decision, Judge Reinhardt. (App. 29a-30a). Judge Reinhardt was the only judge to sign the dissent from the Ninth Circuit's denial of petitioners' request for *en banc* reconsideration wherein he opines that this Court is being "unsympathetic" and lauds Congress for overturning "five major decisions hostile to civil rights" handed down by this Court. (App. 21a, n.1).

II.

THE NINTH CIRCUIT'S DECISION IS BOTH LEGALLY AND LOGICALLY CORRECT.

The second independent basis for denying certiorari is the unassailability of the logic and the correctness of the Ninth Circuit's opinion. Assuming, *arguendo,* that this case meets the criteria for certiorari, there is still no reason to consume the Court's resources by granting certiorari where, as here, the decision below correctly interprets and applies the law.

A. The Ninth Circuit's Decision Is Consistent With Controlling Law.

Petitioners assert that certiorari is necessary to secure uniformity with this Court's decisions regarding the level of deference due to EEOC Guidelines (Petitioners' Brief, p.17), but in fact the decision *is* consistent. The Guideline rejected by the court below was promulgated after the *Garcia* case had been decided, but before *Garcia* was made the law of this Circuit by *Jurado.* The *Garcia* court rejected the EEOC's purported interpretation of the statute, although that interpretation was then merely a "position" and had not yet been formalized into a Guideline. *Garcia, supra,* 618 F.2d at 270-71.

In this Court's most recent pronouncement on deference, *ABF Freight System v. NLRB,* __ U.S. __, 62 U.S.L.W. 4092, 145 L.R.R.M. 2257, 2260 (January 24, 1994), the court, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), reiterated the significance of the distinction between the deference to be accorded regulations or guidelines promulgated by agencies which have "policy-making authority" and those that do not. "When Congress expressly delegates to an administrative agency the authority to make specific policy determinations . . . [that agency's] views merit the greatest deference." *Id.*

As Judge Boochever correctly noted in his partial dissent (App.19a), EEOC has **never** been delegated that type of "policy-making authority." As applied to the present case, EEOC's lack of "policy making authority" required it to go back to Congress with a request for revision of the statute after the *Garcia* court rejected the argument that "English only" rules are **presumed** to violate Title VII. Instead of acknowledging the limits on its authority to make "policy" decisions, and asking Congress to enact appropriate legislation, EEOC proceeded to enforce its already rejected "policy" by formalizing it into the "Guideline" at issue herein.

Aside from the question of the **level** of deference to be accorded the Guideline is whether **this** Guideline deserves **any** deference at all. This Court has held that an interpretive regulation promulgated by a party charged with enforcing an act (such as EEOC here), while normally entitled to special deference, loses that deference if the interpretation:

> . . . cannot be squared with the plain language of the statute. . . . no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and long standing agency interpretations must fall to the extent they conflict with statutory language.

Public Employees Retirement System v. Betts, 492 U.S. 158, 106 L. Ed. 2d 131, 109 S. Ct. 2854, 2863 (1989).

Finally, the Ninth Circuit's decision does not purport to alter the level of deference to be accorded EEOC Guidelines; rather, it merely holds that the Guideline at issue herein (29 C.F.R. § 1606.7(b)) fails to deserve deference because it is clearly inconsistent with the statute and this Court's rulings on the allocation of the burden of proof. (App.16a).

Petitioners give much attention to the various formulations used at various times, by various courts, to describe the applicable standard of deference. The Guideline "presumption" is diametrically opposed to the facts in this record. Therefore, any alleged error in the standard of deference applicable to the Guidelines does not justify review by this Court.

B. The Presumption Of Discrimination Contained In The Guidelines Creates New Substantive Rights Not Intended By Congress.

The portion of the Guideline most strenuously defended by Petitioners and the EEOC is the presumption, as a matter of law, that multi-lingual employees who are denied the opportunity to speak their language of choice during working hours, will feel "inferiority, isolation and intimidation" (hereafter "III"). This Guideline, which the Ninth Circuit struck down, eliminates a key component of Title VII, to wit, the requirement that plaintiff has the initial burden of proffering sufficient evidence to establish a *prima facie* case. That Guideline "presumption" effectively relieves a plaintiff of the obligation to proffer sufficient evidence to establish a *prima facie* case, thereby subverting a fundamental tenet of Title VII analysis which has been firmly established by this Court. *See, e.g., McDonell Douglas, supra,* 411 U.S. at 802-806.

"The plaintiff must first establish a *prima facie* case of discrimination, which, for the purposes of summary judgment, 'refers to the Plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue'." *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1420 (9th Cir. 1990), *citing Palmer v. United States,* 794 F.2d 534, 537 (9th Cir. 1986), *quoting Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 254 n.7 (1981).

The courts have uniformly held that, in a disparate *impact* case (such as this), a plaintiff must put forth even more evidence than

required to establish a *prima facie* case in a disparate treatment case; the plaintiff "must actually prove the discriminatory impact at issue, rather than merely an inference of discriminatory impact." *Rose, supra,* 902 F.2d at 1421, *citing Palmer, supra,* 794 F.2d at 536.

Thus EEOC's Guideline has created a new substantive right never discussed or contemplated by Congress or this Court. As Petitioners admit, a Guideline must be both "reasoned and supportable" to pass muster. *See EEOC v. Puget Log Scaling & Grading Bureau,* 752 F.2d 1389, 1392 (9th Cir. 1985). The Guideline here involved is neither. EEOC Guidelines are neither binding nor persuasive when, as here, they are inconsistent with the statute itself and/or congressional intent. *General Electric Co. v. Gilbert,* 429 U.S. 125, 141-2 (1976); *Espinoza v. Farah Manufacturing Co.,* 414 U.S. 86, 94-5 (1973).

The presumption of discrimination contained in the Guideline is not "reasonable" as applied to this case. The Guideline rejected by the Ninth Circuit completely reworks Title VII in a manner completely at odds with both the statute itself, as well as with congressional intent. The Ninth Circuit correctly decided not to defer to the Guideline because of these "compelling indications that it is wrong." (App. 16a). As shown in the appendix to this brief, the employees who really suffered "III" were the fellow employees of Petitioners who were subjected to their abuse of the Spanish language, not the Petitioners who employed their multi-lingual facility to abuse and harass their fellow employees. At least as shown in this record, the EEOC "presumption" is not supported in logic or in fact. The Ninth Circuit properly refused to follow a presumption which would permit multi-lingual employees to continue to use their language fluency to harass and insult their fellow employees.

Under the Fifth and Ninth Circuit decisions, if "English-only"

rules adopted by employers are discriminatory under the facts there existing, appropriate remedies are available under current law without need for the Guideline. *See, e.g., Saucedo v. Brothers Well Service,* 464 F. Supp. 919 (1979) (pre-Guideline case where the court held an English-only rule had been improperly applied in a discriminatory fashion). The plaintiff in *Saucedo* prevailed without the legal "presumption" of the Guideline because he proved a *prima facie* case of discriminatory impact based *on facts. Id.* Thus, the invalidity of the presumption of discriminatory effect contained in the Guideline is not an impediment to relief under Title VII where the facts show a discriminatory effect.

C. The "Significant Impact" Requirement Is In Accord With Both Logic And Applicable Law.

The Ninth Circuit's decision that Title VII only prevents "neutral" employment practices which have a "significant impact" on the affected employees, and does not prohibit mere minor inconvenience, is correct. (App. 14a). Petitioners create a "strawman"; they attack the Court's reliance on *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986) as authority for the holding that a hostile environment must be "pervasive" before it will be held to violate Title VII. They argue that the Court has misapplied the sexual harassment Guidelines approved in *Vinson* to the present case. (Petitioners' Brief, pp. 26-28).

The opinion below is quite clear that it is following the *Vinson* **rationale, not the Guideline** there involved. "Although *Vinson* is a sexual harassment case . . . its rationale applies equally to cases in which seemingly neutral policies of a company infuse the atmosphere of the workplace with discrimination." (App. 14a). (emphasis supplied). The opinion correctly cites *Vinson* for the principle that the effects of an alleged hostile environment must be "pervasive" to violate Title VII. (App. 14a).

Petitioners would have Title VII invalidate any "neutral" employer rule which has *any* potential to cause subjective "III" on a multi-cultural workforce, however *de minimis* or trivial. For example, EEOC'S and Petitioners' interpretation of Title VII would arguably prohibit an employer from flying an American flag at the workplace because it might cause feelings of "III" among employees whose country of origin is not the United States. Despite Petitioners' and EEOC's unhappiness with the "significant impact" threshold of the Ninth Circuit's analysis, that point is sound and is consistent with prior holdings of this Court.

D. The Legislative History Cited Is Inapposite.

Petitioners argue that the legislative history of the Civil Rights Act of 1991 (hereafter "CRA") supports the lawfulness of the Guidelines, quoting from a brief conversation between Senators Kennedy and DeConcini during floor debate. They argue from this single item of dialogue between two Senators, that the EEOC Guidelines became engrafted in Title VII, just as if the "presumption" contained in the Guideline had been specifically enacted by Congress, either in 1964 or in 1991. This effort at creating *post-hoc* legislative history through dialogue lacks merit and should be rejected.

The legislative history of the CRA cited by Petitioners is inapposite to the present case. The CRA involved certain *specific cases* in which Congress wanted to change the result, but none of those cases involved English-only rules. Moreover, it is a fundamental tenet of statutory construction that legislative history of a subsequent Act is not indicative of congressional intent on earlier legislation. Here, the discussion of legislative purpose of the CRA in 1991 is more than 25 years after the enactment of Title VII in 1964. The legislative history cited is not persuasive on the question of congressional intent in enacting Title VII in 1964.

We have observed on more than one occasion

> that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute. [citations omitted].

Betts, supra, 109 S. Ct. at 2861.

An additional reason why the dialogue should not be accepted as "legislative history" is because the purported interpretation does not involve any language in the CRA itself. Moreover, the CRA expressly provides that its definitive legislative history is the House Report and Interpretive Memorandum. That being the case, informal dialogue relied upon by Petitioners is irrelevant.

Contrary to Petitioners' effort to rely on the CRA, in fact there is explicit language in Section 105 of the CRA which is inconsistent with the "presumption" in the Guideline, and thus could reasonably be construed as a repudiation of the Guideline.

In Section 105 of the CRA, Congress reaffirmed that the "burden of proof in disparate impact cases" lies with the plaintiff and further provided that the statute is violated where a complaining party "demonstrates a disparate impact" *and* the respondent fails to prove business necessity. The word "demonstrates" is defined to mean "meets the burdens of production and persuasion." *Id.* This statutory requirement is on its face inconsistent with the presumption contained in the Guidelines.

In discussing why Congress wished to place the burden of proof on an employer to prove business necessity, the House Report noted:

> . . . that once the plaintiff has shown the

> discriminatory effect, he or she has shown that discrimination in fact exists; . . . .

(Page 28 fn. 12).

The House Report also observed that:

> . . . under our legal system, determination of which party should bear the burden of proof of a particular fact should be based on such common-sense considerations as which party has access to the underlying information. . . .

(Page 29).

This analysis is completely inconsistent with the presumption of the Guideline. If persons impacted by an English-only rule can establish that the rule, as applied to them, had a significant discriminatory effect, that showing would meet the plaintiff's initial burden and the employer would then be required to show business necessity to justify the rule. If employees cannot prove that the rule causes any discriminatory effect, the EEOC's "presumption" should not serve to shift the burden of proving "business necessity" to the employer.

When the Civil Rights Act of 1964 was being debated, English-only rules were never discussed (App. 17a); Petitioners would magically transform this omission into congressional approval of the Guideline "presumption," despite the fact that it was not adopted until almost twenty years later.

In fact, if Congress wished to prohibit or regulate English-only rules as a form of "discrimination," it has had ample opportunity, since *Garcia, supra,* expressly validated such rules in 1980, to take legislative action to change the result and codify

EEOC'S presumption of discrimination. The flipside of this argument is that Congress' failure to expressly invalidate the Guideline does not, *a fortiori,* mean they agree with it. Legislative history does not assist Petitioners.

E. Congress, Not This Court, Is The Appropriate Venue For Petitioners' Arguments.

Petitioners' brief is addressed primarily to their social policy objectives of what the law should be. It is axiomatic that it is the province of Congress, not the courts, to weigh conflicting views of public policy. This Court should decline Petitioners' invitation to usurp the congressional function and permit EEOC to legislate social policy.

The Ninth Circuit has refused to follow one of EEOC's policy determinations which exceeded the authority delegated to it by Congress, and this Court should not validate the EEOC's effort to legislate social policy when Congress has not chosen to delegate that authority to EEOC.

III.

HARRIS v. FORKLIFT SYSTEMS DOES NOT ALTER OR AFFECT THE NINTH CIRCUIT'S OPINION BELOW.

Petitioners, in an effort to come up with any argument to support reversal, make the false statement that the opinion below "was predicated on its application of a legal standard erroneously discerned from the language of the Fifth Circuit's decision in *Rogers v. EEOC.*" (Petitioners' Brief, p. 26). While the Ninth Circuit did cite this Court's opinion in *Meritor Savings Bank v. Vinson,* which in turn quoted from *Rogers,* nowhere does the Ninth Circuit write that it is basing its reasoning or decision on any "legal standard" from *Rogers.* Further, *Vinson* was not overruled by

Harris, wherein this Court elaborated further on the required severity of sexual harassment before it violates Title VII. To apply that decision, lowering the threshold of actionable sexual harassment, to challenges to "English only" rules defies both logic and common sense. Petitioners make no persuasive argument supporting the applicability of *Harris* to this case.

Finally, Petitioners resort to outright falsehood when they refer to "plaintiffs' substantial evidence in the instant case, describing the intimidating manner in which the English-only rule was enforced." (Petitioners' Brief, p. 27). Petitioners do not cite to any evidence in the record to support this assertion because there is none. Petitioners' *Harris* argument is totally lacking in merit.

IV.

THE CASE OF *GARCIA v. SPUN STEAK* WAS ALSO PROPERLY DECIDED ON ITS FACTS.

Most of the focus of this Petition for Certiorari has been on the EEOC Guideline struck down by the Ninth Circuit. The underlying factual scenario which brought the case here, Spun Steak's limited English-only rule, will now briefly be discussed for the purpose of correcting the misrepresentations in Petitioners' brief, and of illustrating the fallacy inherent in their argument.

First, Judge Boochever wrote "I agree with most of the majority's carefully crafted opinion. I dissent, however, from the majority's rejection of the EEOC guidelines." (App. 18a). Therefore, contrary to Petitioners' false assertion that the summary judgment for Petitioners was reversed "in a two-to-one decision" (Petitioners' Brief, p. 7), the Ninth Circuit was unanimous in reversing the summary judgment granted to Petitioners.

Second, when Spun Steak's Policy was first adopted, none of the Spanish speaking employees, multi-lingual or not, objected to either the employer or the union that they felt "III" because of the Policy. On the contrary, the only persons who immediately came forward stating that they were humiliated and embarrassed were African-American and Asian-American employees who were being subjected to racist and sexually derogatory comments by Petitioners Garcia and Buitrago.[4] These record facts, showing that the humiliation and embarrassment in the workplace was actually suffered by the persons subjected to abuse of multi-lingual fluency, rather than the multi-lingual employees who perpetrated that abuse, is sufficient to warrant a holding that the Guideline's presumption is often contrary to the workplace reality. The Guidelines' preference for the purported "right" of multi-lingual employees to speak their language of choice, even at the expense of humilation and abuse to African-American and Asian-American employees, suggests that the EEOC has made a policy decision balancing competing interests which could only be made by Congress. In any event, this Court need not address this issue, since the EEOC has the clear alternative of presenting those difficult balancing issues to Congress.

There is no evidence in the record that any of Spun Steak's employees felt any "III" from the Policy prior to the intervention of EEOC (those sentiments were first expressed in EEOC charges filed over seven months after the Policy was first adopted). Moreover, it appears significant that the only members of Spun Steak's predominantly Spanish-speaking workforce who asserted

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4. To give the flavor of the type of comments made in Spanish by Petitioners Garcia and Buitrago which necessitated Spun Steak's "English only" policy, Spun Steak has filed herewith Respondent's Appendices A and B with a small sampling of the comments made which are reflected in the record below. These comments are indicative of Petitioners' abuse of the privilege of communication during working hours which directly led to adoption of Spun Steak's policy.

that they suffered "III" from the Policy were Petitioners Garcia and Buitrago.

Petitioners attempt to make a semantic distinction between employees who are "fully bilingual" versus merely "bilingual." While that "distinction" may have great interest to psychologists, sociologists, and law review authors, it was not considered significant by the two courts of appeals' decisions which previously held that "English only" rules do not violate Title VII when applied to "bilingual" employees (*Garcia* and *Jurado*). The record below is replete with evidence that Garcia speaks English as her *first* language and Buitrago is perfectly capable of conversing in English; the Ninth Circuit correctly found both to be "bilingual." (App. 2a-3a).

On the basis of this illusory distinction, Petitioners castigate the Ninth Circuit for following *Jurado* and *Garcia*. They continue to assiduously urge that the vacated *Gutierrez* decision remains the law of the Ninth Circuit, and should be adopted by this Court as the law of the entire United States. The Ninth Circuit properly rejected this specious "distinction" and correctly held that using English was "a matter of choice" for Petitioners Garcia and Buitrago (App. 12a-13a); based on this conclusion, the court correctly followed *Garcia* and *Jurado*.

The Ninth Circuit, using considerable common sense, held that the burden imposed, if any, by the Policy adopted by Spun Steak was not sufficiently significant as to result in a denial of equal employment opportunity, the evil proscribed by Title VII. (App. 13a). Therefore, the Ninth Circuit correctly held that Petitioners have suffered no "injury" compensable under Title VII.

CONCLUSION

Spun Steak respectfully submits that Petitioners have failed to meet their burden of demonstrating that this case is appropriate for certiorari. The Ninth Circuit's opinion is consistent with the other cases on point; a contrary decision would have produced a clear conflict with the Fifth Circuit's *Garcia* decision and the Ninth Circuit's own *Jurado* decision. Spun Steak submits that this Court's limited resources can be put to more productive use than granting certiorari, which will merely allow Petitioners one more judicial forum for their social policy arguments. By denying the instant Petition for Certiorari, this Court can send a message to the moving force behind this Petition (the American Civil Liberties Union[5]) that their arguments should be addressed to Congress, not this Honorable Court.

Spun Steak therefore respectfully requests that this Court deny the Petition for Certiorari.

Respectfully submitted,

JAMES A. CARTER
Counsel of Record
CARTER & CARTER
Attorneys for Respondent

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5. Spun Steak asks that this Court take judicial notice that Petitioners' brief designates Ed Chen of the ACLU as "counsel of record."

APPENDIX A — EXCERPTS FROM DECLARATION OF ROCIO LARA MORGAN

(Excerpts Of Record in Ninth Circuit, Pages 000203 - 5)

4. *** During my employment, both Priscilla Garcia and Maricela Bouitrago frequently used Spanish to insult other people by talking about them and laughing at them. I could see that other persons who did not understand Spanish were upset, they became nervous, and knew they were being insulted and laughed at. That ridicule sometimes appeared to impair their ability to concentrate on the work, to the point that I believed they might cause an accident.

5. On many occasions I heard Priscilla Garcia make comments about other employees which I understood as racial or ethnic insults. *** I also recall on many occasion her making comments about Al Cowlah and insulting comments about black people. I remember her describing Ben Ching, in Spanish, as a "lazy Chinese". Both Priscilla Garcia and Maricela Bouitrago would frequently make fun of Ben's appearance, how he moved, and how he talked.

6. Maricela Bouitrago constantly used language which I would describe as completely filthy. She constantly used obscene language, in both English and Spanish, directed at various employees and in general conversation with her co-workers.

7. I also observed Maricela Bouitrago engage in a constant pattern of harassment of Al Cowlah. *** I also frequently heard her using obscene language in conversation directed to Al Cowlah, and she also described him in offensive racial terms in conversation about him when he was not present. Many times I heard her yell at him, "Hey you nigger". ***

Appendix A

8. Maricela Bouitrago would also frequently revert to Spanish when either Al, Mitch, Nancy or Shirley were present, speaking in a loud voice and making it clear that she was talking about them but using Spanish so they would not understand her. When she made comments about those employees in Spanish, the Spanish speaking employees would often laugh, making it clear that the other employees were the subject of the jokes. In fact Maricela Bouitrago would often say, "Al" or "Mitch" or "Nancy" or "Shirley" as part of her Spanish conversation so the employees would know he or she was being talked about.

APPENDIX B — EXCERPTS FROM DECLARATION OF MANUEL LARA

(Excerpts of Record in Ninth Circuit, Pages 000163 - 4)

3. In my capacity as Plant Foreman, I supervise approximately 30 employees. Of those, 15 are of Hispanic American origin, 2 are African American, 1 is Chinese American and 12 are Caucasian.

4. Following the adoption of the English Only policy by the Company, I heard only two employees, Priscilla Garcia and Marcella Buitrago, object or complain about the adoption of that policy. It is my opinion that all of the other Company employees support the English Only policy. ***

5. On or about September, 1990 I informed Ken Bertelsen that I heard Marcella Buitrago and Priscilla Garcia use bad words in conversations with Al Cowlah. Marcella Buitrago used bad words more often than Priscilla Garcia, but both used words such as "black son of a bitch", "black asshole", and outside Al Cowlah's presence, "nigger". In response, I heard Al Cowlah on more than one occasion say to them: "That's enough, I don't want to talk to you any more." ***

I also told Ken Bertelsen that in addition to using such language about Al Cowlah in English, both Ms. Buitrago and Garcia would often talk in Spanish about Al Cowlah, making comments about his racial background and work performance, often accompanied by laughter and in a fashion which would indicate to Al Cowlah that they were talking about him.

Appendix B

I told Ken Bertelsen that I had heard Marcella Buitrago say bad words of an offensive nature, about Ben Ching, although I could not recall the specific words she had used. I also told Mr. Bertelsen that I had heard both Marcella Buitrago and Priscilla Garcia make comments in Spanish, during work time, which were critical of Ben Ching's performance. I also indicated that I had noticed that Ben Ching is a nervous individual who gets more nervous and makes mistakes when Buitrago and Garcia were talking about him, laughing at him, and making comments in Spanish. It was my opinion that the use of Spanish language during work hours by Buitrago and Garcia did potentially endanger Ben Ching, since the machine he works is dangerous. It was also my opinion that the use of Spanish language during work hours reduced productivity since it resulted in Ben Ching slowing down his performance, which slows the entire line.

7. I have also heard Priscilla Garcia and Marcella Buitrago making comments in Spanish about Nancy Soria while all three were working on the line. It is my understanding that Nancy knows enough Spanish to know that they are talking about her, but not enough Spanish to know what they are saying. It is my opinion that the Spanish conversations about Nancy Soria while working the line disrupts her performance and thus injures the Company's productivity.

8. All of the employees on the day crew can communicate in English and, in my opinion, requiring that all communications be in English during work hours does improve employee safety, product safety, and employee productivity.

9. In my opinion, Marcella Buitrago opposes the English Only rule simply because she enjoys hurting other employees' feelings by conversing in Spanish. She has frequently made insulting

comments about other employees, both in English and Spanish. On one occasion when I asked Marcella Buitrago to work overtime she responded by calling me names including "son of a bitch" and "Maricon", the Spanish word for queer or gay.***